

**IN THE HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR**

(THROUGH VIRTUAL MODE)

Reserved on: 30.06.2021
Pronounced on: 09.07.2021

CRMC No.437/2018

DR. TAWSEEF AHMAD BHAT

...PETITIONER(S)

Through: Mr. M. A. Qayoom, Advocate.

Vs.

STATE OF J&K & ANR.

....RESPONDENT(S)

Through: Mr. Bikramdeep Singh, GA.

CORAM:HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1) Impugned in this petition, filed under Section 561-A Code of Criminal Procedure (as it was then in force), is FIR No.69/2018 registered by Police Station, Bani, against the petitioner under Section 3 of Prevention of Insult to National Honour Act, 1971 [“the Act”]. During 2017-2018, when the impugned FIR was registered, the petitioner was working as Lecturer in Government Degree College, Bani, on contractual basis. The petitioner was engaged as Lecturer in August, 2017, for a period of one year, which period was extended for another year vide order No.GGM/Acad/Arrg/POL/2018-19/012 dated 4th of August, 2018.

2) While the petitioner was serving in the second spell of his engagement, on 29th of September, 2018, the College was celebrating surgical strike conducted by Indian Army against the neighbouring Country. As is claimed by the petitioner, on the request of Clerk of the College, the petitioner stopped the class work and allowed the students to participate in the function. The petitioner claims that he too joined the students and attended the function. The function started with the singing of National Anthem. The petitioner asserts that he along with staff was also standing when the National Anthem was being sung.

3) The petitioner submits that while he was taking the examination of B. A. 5th Semester, some students came and informed him that a group of students was holding demonstration against him inside the College premises on the ground that he had shown disrespect to the National Anthem. On the instigation of one Pawan Sharma, Computer Clerk, the demonstrating students approached SDM, Bani, with a written application. The application was forwarded by SDM, Bani, to Police Station, Bani, with a direction to lodge an FIR against the petitioner. It is alleged that it is only on the basis of the directions issued by SDM, impugned FIR was registered and the investigation set in motion. The petitioner, as is claimed by him, lost his contractual appointment because of registration of aforesaid FIR. He was discharged from service vide order dated 3rd October, 2018.

4) The petitioner is aggrieved and has assailed the registration of impugned FIR on the following grounds:

(i) That the respondent No.2-Sub Divisional Magistrate, Bani, who also exercises powers of Executive Magistrate, Class-1, is not competent in law to direct the police to register an FIR. It is only the Judicial Magistrate Class-1, who is empowered to issue such directions in terms of Section 156(3) of the Code of Criminal Procedure [“the Code” for short hereinafter].

(ii) That the allegations contained in the FIR, if taken to be true on their face value, do not constitute offence under Section 3 of the Act. There is no allegation that the petitioner prevented the singing of National Anthem or caused any disturbance to any assembly engaged in such singing.

5) Having heard learned counsel for the parties and perused record, I am of the view that this petition raises following two questions of seminal importance:

(I) Whether an Executive Magistrate Class-1 is empowered under the provisions of the Code to direct registration of an FIR?

(II) Whether non-participation in the singing of National Anthem is an offence under Section 3 of the Act and whether the person who shows disrespect to the National Anthem without preventing its singing or disturbing the assembly engaged in such singing, can be booked under Section 3 of the Act?

Question No.(I): Whether an Executive Magistrate Class-1 is empowered under the provisions of the Code to direct registration of an FIR?

6) It is argued by Mr. Qayoom, learned counsel for the petitioner, that under the scheme of the Code, the Executive Magistrate has not been empowered to direct registration of an FIR and this power in terms of Section 156(3) of the Code is conferred upon a Judicial Magistrate empowered under Section 190 to take cognizance of an offence.

7) *Per contra*, it is argued by Mr. Bikramdeep Singh, learned counsel representing the respondents, that the Executive Magistrate, in the instant case, did not order registration of FIR but only brought the information disclosing the commission of cognizable offence to the notice of the police for taking appropriate action.

8) It is true that in terms of Section 154 of the Code, if any information relating to commission of a cognizable offence is received by Officer I/C of a Police Station, he is obliged to register an

FIR. Similarly, under Section 156(1) of the Code, Officer I/C of a Police station, who receives such information and registers an FIR, is empowered to investigate any cognizable offence without order of a Magistrate. Sub-section (3) of Section 156 of the Code confers power upon the Magistrate empowered under Section 190 of the Code to order investigation in a cognizable offence.

9) A conjoint reading of Section 154 and 156 would clearly show that power to direct investigation in a cognizable case, would necessarily include the power to direct the police to register an FIR. Section 156(3) confers such power upon ‘the Magistrate’ empowered under Section 190 of the Code to take cognizance. Section 156 uses the expression “any Magistrate” which may give an impression that “any Magistrate” would mean either Executive Magistrate or Judicial Magistrate. However, Section 3 of the Code clears this smog. Section 3 clearly provides that any reference to a Magistrate, without any qualifying words, shall be construed “unless the context otherwise requires” in relation to an area outside a metropolitan area, as a reference to a Judicial Magistrate and in relation to a metropolitan area, as a reference to a Metropolitan Magistrate. It is thus evident that the Magistrate empowered under sub-section (3) of Section 156 of the Code to direct the Police to register an FIR and investigate a cognizable case is a Judicial Magistrate and not an Executive Magistrate. If that be the clear legal position, it cannot be gainsaid that under the scheme of the Code, an Executive Magistrate is conferred any power to direct registration of FIR for sub-section (3) of Section

156 of the Code Clearly excludes Executive Magistrate from exercising any power to direct an investigation in the cognizable offence. For facility of reference, Section 156 (3) and Section 3 of Cr.P.C are reproduced below:-

“Section 156. Police officer’s power to investigate cognizable case—

- (1)
- (2)
- (3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned.”

“Section 3. Construction of references.

(1) In this Code,-

(a) any reference, without any qualifying words, to a Magistrate, shall be construed, unless the context otherwise requires,-

(i) in relation to an area outside a metropolitan area, as a reference to a Judicial Magistrate;

(ii) in relation to a metropolitan area, as a reference to a Metropolitan Magistrate;

(b) any reference to a Magistrate of the second class shall, in relation to an area outside a metropolitan area, be construed as a reference to a Judicial Magistrate of the second class, and, in relation to a metropolitan area, as a reference to a Metropolitan Magistrate;

(c) any reference to a Magistrate of the first class shall,-

(i) in relation to a metropolitan area, be construed as a reference to a Metropolitan Magistrate exercising jurisdiction in that area,

(ii) in relation to any other area, be construed as a reference to a Judicial Magistrate of the first class exercising jurisdiction in that area;

(d) any reference to the Chief Judicial Magistrate shall, in relation to a metropolitan area, be construed as a

reference to the Chief Metropolitan Magistrate exercising jurisdiction in that area.

(2) In this Code, unless the context otherwise requires, any reference to the Court of a Judicial Magistrate shall, in relation to a metropolitan area, be construed as a reference to the Court of the Metropolitan Magistrate for that area.

(3) Unless the context otherwise requires, any reference in any enactment passed before the commencement of this Code,-

(a) to a Magistrate of the first class, shall be construed as a reference to a Judicial Magistrate of the first class;

(b) to a Magistrate of the second class or of the third class, shall be construed as a reference to a Judicial Magistrate of the second class;

(c) to a Presidency Magistrate or Chief Presidency Magistrate, shall be construed as a reference, respectively, to a Metropolitan Magistrate or the Chief Metropolitan Magistrate;

(d) to any area which is included in a metropolitan area, as a reference to such metropolitan area, and any reference to a Magistrate of the first class or of the second class in relation to such area, shall be construed as a reference to the Metropolitan Magistrate exercising jurisdiction in such area.

(4) Where, under any law, other than this Code, the functions exercisable by a Magistrate relate to matters-

(a) which involve the appreciation or sifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any Court, they shall, subject to the provisions of this Code, be exercisable by a Judicial Magistrate; or

(b) which are administrative or executive in nature, such as, the granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an Executive Magistrate.”

10) In the instant case, it is seen that SDM, Bani, who was presented an application by the aggrieved students narrating the conduct of the petitioner during singing at the beginning of surgical strike celebrations in the College, upon enquiry found that the petitioner had, by his conduct, shown disrespect to the National Anthem and, therefore, liable to be proceeded in accordance with law. Accordingly, he forwarded the application in original to Police Station, Bani, with a direction to register an FIR against the culprit under rules. The SDM, while forwarding the application, also endorsed thereupon his observations that on enquiry from students he was told that the petitioner had intentionally caused disturbance in the assembly while the National Anthem was being sung and, therefore, dishonoured the National Anthem.

11) From a perusal of FIR, it clearly transpires that the police registered the FIR not only on the basis of directions of SDM but also took note of the contents of the application. In such circumstances the forwarding of the complaint of the students with his observations by the SDM can be construed as bringing the relevant information relating to commission of cognizable offence to the notice of police for performance of its statutory duty of registration of FIR under Section 154 of the Code. It is thus not correct to say that impugned FIR has been registered solely on the basis of directions issued by SDM, Bani, who, being an Executive Magistrate, is not empowered to do so. I am, therefore, of the view that though an Executive

Magistrate may not be empowered under Section 156(3) of the Code to direct investigation in the cognizable offence yet he can bring to the notice of the police the information relating to commission of cognizable offence and direct it to perform its statutory duty. In this view, I am fortified by a judgment of the Supreme Court in the case of **Naman Singh and another v. State of UP, (2019) 2 SCC 344**. In the aforesaid case, the issue before the Supreme Court was as to whether SDM, Unnao, was competent to direct the police to register FIR on the basis of a complaint received by him from the complainant that she had been duped into taking admission in an unrecognized institution. The SDM, Unnao, on the very same day, without furthermore, directed the police to register an FIR. In the aforesaid backdrop, the question that fell for consideration before the Supreme Court was whether SDM was competent to do so and whether such an FIR can be said to have been registered in accordance with the procedure laid down in the provisions of the Code. The Hon'ble Supreme Court after taking note of the scheme of the Code, particularly the provisions of Section 154, 156 and 190, held in para 5 to 7 as under:

5. Section 154 of the Code provides for registration of a first information report at the instance of an informant, reduced into writing and signed by the person giving it. Section 154(3) stipulates that in the event of a refusal on part of an officer in charge of a police station to record such information, it may be sent in writing and by post to the Superintendent of Police who will direct investigation into the same.

6. Section 190 of the Code provides for taking of cognizance by a Magistrate either on a complaint or upon a police report. Similarly, Section 156(3)

provides that any Magistrate empowered under Section 190 may order such an investigation, and which also includes the power to direct the lodgment of an F.I.R. The Code in Section 200 provides for lodging of a complaint before the Magistrate, who after examination of the complainant and witnesses, if any, can take cognizance.

7. It is therefore apparent that in the scheme of the Code, an Executive Magistrate has no role to play in directing the police to register an F.I.R. on basis of a private complaint lodged before him. If a complaint is lodged before the Executive Magistrate regarding an issue over which he has administrative jurisdiction, and the Magistrate proceeds to hold an administrative inquiry, it may be possible for him to lodge an F.I.R. himself in the matter. In such a case, entirely different considerations would arise. A reading of the F.I.R. reveals that the police has registered the F.I.R. on directions of the Sub-Divisional Magistrate which was clearly impermissible in the law. The Sub-Divisional Magistrate does not exercise powers under Section 156(3) of the Code. The very institution of the F.I.R. in the manner done is contrary to the law and without jurisdiction.”

12) If the case set up by the petitioner is examined in the light of the aforesaid judgment of the Supreme Court, one would find that in the instant case, SDM, Bani, did not simply forward the complaint as it is, but he also held a brief enquiry to verify the truthfulness of the allegations contained in the complaint. It is only when it was brought to the notice of the SDM by the complainant students that the petitioner had disturbed the singing of National Anthem and shown disrespect to the National Anthem, the Magistrate forwarded the complaint along with his observations/endorsement to the police station with a direction to register an FIR under Rules. The position would have been different had the police acted merely on the basis of the directions of the SDM but it took cognizance and registered FIR after looking into the contents of the complaint.

13) It is, thus, concluded that in the scheme of the Code, an Executive Magistrate is not empowered to direct the police to register an FIR on the basis of a complaint lodged before him but if an information relating to commission of cognizable offence is brought to the notice of an Executive Magistrate, who, after holding an enquiry, finds such commission of offence, he may forward the information to the police for performance of its statutory duty under Section 154 of the Code. Needless to say that under Section 154 of the Code, the police is under an obligation to register an FIR and start investigation if it receives an information, either in writing or orally, in relation to commission of a cognizable offence.

Question No.II: Whether non-participation in the singing of National Anthem is an offence under Section 3 of the Act and whether the person who shows disrespect to the National Anthem can be booked under Section 3 of the Act?

14) Before proceeding to deal with this question, it is necessary to first set out Section 3 of the Act:

“3. Prevention of singing of Indian National Anthem, etc.—Whoever Intentionally prevents the singing of the Indian National Anthem or causes disturbance to any assembly engaged in such singing shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.”

15) From a bare reading of Section 3, it is crystal clear that it is intentional preventing of the singing of the Indian National Anthem or causing disturbance to any assembly engaged in such singing that is made punishable with imprisonment up to three years, or with fine, or

with both. Interestingly and indisputably, mere disrespect to Indian National Anthem is not an offence *per se*. It is only if the conduct of a person amounts to preventing the singing of Indian National Anthem or causing disturbance to any assembly engaged in such singing, it entails penal consequences in terms of Section 3 of the Act. Not standing up while the Indian National Anthem is being sung or standing up but not singing the National Anthem along with members of the assembly engaged in such singing may amount to disrespect to the National Anthem and a failure to adhere to a fundamental duties enumerated in Part IVA of the Constitution of India but is not an offence as defined under Section 3 of the Act.

16) It may be relevant to note that at the time of promulgation of Constitution of India, there was a full dedicated Chapter of fundamental rights i.e. Part III in the Constitution of India without any reference to correlative fundamental duties. It was only by way of the Constitution (Forty-Second Amendment) Act, 1976, Part IVA pertaining to fundamental duties was introduced and various fundamental duties were enumerated in Article 51A. The first fundamental duty enumerated in Article 51A reads thus:

“to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem.”

17) It is, thus, evident, that the fundamental duties by the citizens towards Nation were constitutionally recognized and made part of the solemn document i.e. the Constitution of India that we the people of

India have given to us. It is now the fundamental duty of every citizen, who claims fundamental and statutory rights from the State, to abide by the Constitution, respect its ideals and institutions, hold its National Flag and National Anthem in high esteem. Any infraction in this regard shall be treated as breach of fundamental duties which may disentitle a citizen to claim fundamental and other statutory rights. It needs no emphasis that though the fundamental duties like the directive principles are of great importance, one [Directive Principles] reminds the State of its obligations towards its citizens and other [Fundamental Duties] reminds its citizens about their duties towards Nation yet like the directive principles of State policy, the fundamental duties enumerated in Part IVA of the Constitution are also not enforceable in law nor the breach of such duties is an offence under any penal law of the State.

18) The Act makes insult to the Indian National Flag as an offence under Section 2 and also penalises the conduct of a person who either prevents singing of the National Anthem or causes any disturbance to any assembly engaged in such singing. This is so provided under Section 3, reproduced hereinabove. It is, thus, concluded that though certain conduct of individuals like not standing up while the National Anthem is being played or standing quiet in the assembly engaged in the singing of National Anthem may amount to showing disrespect to the National Anthem but would not, *per se*, constitute an offence under Section 3 of the Act. At the cost of repetition, it is pointed out that only two type of conduct exhibited by a person or persons in

relation to National Anthem is penalised under Section 3 of the Act. It is the conduct that prevents singing of the National Anthem or that causes disturbance in the assembly engaged in such singing, that is declared as an offence under Section 3 of the Act and punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

19) At this juncture, I deem it relevant to take note of the Prevention of Insults to National Honour (Amendment) Bill, 2019, a private bill introduced by Shri Parvesh Sahib Singh, M.P. in the Lok Sabha. The aforesaid bill was aimed at bringing within the purview of Section 3 of the Act intentional disrespect to the National Anthem. The Section 3, as proposed in the bill to substitute the existing Section 3 of the Act, reads thus:

“Whoever intentionally prevents the singing of the Indian National Anthem or causes disturbance to any assembly engaged in such singing or **intentionally causes disrespect to the National Anthem**, shall be punished with imprisonment for a term, which may extend to three years, or with fine, or with both.

Explanation:--For the purposes of this section, the word “disrespect” shall include any person refusing to stand for or recite the National Anthem except when such person is suffering from any physical disability in that regard.”

20) It appears that this private bill introduced by Shri Parvesh Sahib Singh did not pass muster.

21) The reference to the bill aforesaid has been made only to emphasise the point that Section 3 of the Act, as it stands as on date,

does not make “disrespect” to the Indian National Anthem an offence unless it has the effect of preventing the signing of National Anthem or disturbing the assembly engaged in such signing. The conduct must amount to either preventing the signing of the National Anthem or causing disturbance in the assembly engaged in such singing so as to bring it within the purview of Section 3 of the Act.

22) From a perusal of impugned FIR, which is based on the written complaint of the students, it clearly transpires that it does not attribute any act to the petitioner which may be tantamounting to preventing anybody from singing the Indian National Anthem or causing any disturbance to the assembly which was engaged in such singing. Failure of the petitioner to participate in the assembly engaged in singing of Indian National Anthem, intentionally or otherwise, and roaming about in the school premises where the assembly was engaged in singing Indian National Anthem, in my opinion, would not amount to either preventing the singing of Indian National Anthem or causing any disturbance to the assembly engaged in such singing. The conduct of the petitioner, if intentional, may amount to showing disrespect to the National Anthem and a breach of fundamental duty enjoined on citizens of the Country by Article 51A of the Constitution. The petitioner by losing his contractual job has already paid the price.

23) For the foregoing reasons, I am of the opinion that the contents of FIR, which is based upon a written complaint of the students of the

College, do not constitute a cognizable offence and, therefore, registration of FIR and setting the investigating machinery in motion was not called for. The observations made by SDM, Bani, that on enquiry he found that the petitioner had intentionally caused disturbance in the assembly engaged in signing National Anthem is clearly an afterthought and was not part of the complaint made before him by the students nor is such observation supported by any material particulars.

24) Be that as it is, in these circumstances allowing the investigating machinery to proceed in the matter would be an abuse of process of law. I, therefore, in the exercise of inherent jurisdiction vested in this Court by Section 561-A of Cr. P. C., Svt. 1989 (now repealed and replaced by Section 482 Cr. P. C., 1973) quash the impugned FIR.

(Sanjeev Kumar)
Judge

Srinagar
09.07.2021
"Vinod, PS"

Whether the order is speaking:	Yes
Whether the order is reportable:	Yes